The Central Law Journal.

ST. LOUIS, DECEMBER 18, 1891.

The printer made sad havoc of our language in editorial in last week's issue, commenting on Chief Justice Bleckley, by printing the word "picknickian" for "Pickwickian." Though our readers probably understood what was meant, we deem it but justice to the eminent judge to say that though he may occasionally use language of a "Pickwickian" character, there is nothing "picknickian" about him.

A correspondent of the Albany Law Journal, writing upon the subject of the Tilden will case, maintains that it is a matter of record that Mr. O'Connor told Mr. Tilden that the will would not stand because of the reasons now given by the court in setting it aside, and that the question of its validity was discussed by Mr. Tilden with many eminent lawyers, and that therefore he must have known and felt some doubt about it. The correspondent also questions whether it is not "the opinion of many of our ablest lawyers who knew Mr. Tilden well, that he was quite content to have it said of him that he had tried to establish a great library but the wicked lawyers prevented it. It does not take any great stretch of the imagination to think of him as chuckling over the reputation he is getting on the strength of the library he wanted to establish, which the lawyers prevented him from establishing, and then thinking with quiet satisfaction that his property went to his relatives, where it naturally would go and where he intended it should go all the time." Though we are hardly prepared to agree with the view of the correspondent, without more convincing testimony, it does indeed seem strange that a man of the ability and wisdom usually ascribed to Mr. Tilden should, in the face of doubt and question on the subject, have left the fate of the provisions of his will to the determination of the courts, when he could easily have placed them beyond controversy.

The "Autobiography of a Justice of the Peace," which appears in a late number of the *Century* magazine, will hardly encourage many of the youths of the nation to aspire to that ancient and strictly honorable office, though its author has written it, as he states, as a plea to the "bright-eyed students and farm hands who are just attaining their majority, to fit themselves to occupy the woolsack thus left vacant by the death of older justices of the peace." The justice of the peace whose official life in the far west is humorously portrayed, emigrated from the State of Maine. We are told that his parents were poor, but "were so honest that it occasioned comment. As they grew older they found that their integrity had become so fixed upon them that they could not throw it off." Chosen by the people of the village on the frontier as a justice of the peace, he trembled for fear that he would not successfully fill the place of his predecessor, and so used to go over to the penitentiary, "where he was stopping for a few years," to get points from him as to his course of action. Furnishing his "compressed room" by means of a bright red stove and a copy of the revised statutes, he was ready "to mete out substantial justice to those who would call and examine stock and prices." Though he was called "judge," and frequently mentioned in the papers with great consideration, he was out of coal about half the time, and once "could not mail letters for three weeks because he did not have the necessary postage." During this time "his friends in the Eastern States may possibly recall the time" when his correspondence seemed to flag. One of his first duties was to marry a couple. The groom was a frontiersman and the bride "a peri from Owl Creek, wearing moccasins of the pliocene age," and, by name, "Beautiful Snow." The groom was a man of courage, and held human life at a low figure. "That is why he married Beautiful Snow without ever flinching; also why I refrained from mentioning his name; also why I kissed the bride. I did not yearn to kiss her. There were others who had claims on me, but I did not wish to give needless pain to the groom and so I did it."

Later on, the legislature, seeing that the county would have to provide for him in

some way, decided to abolish one of the other justices. Then trade picked up. He was also *ex officio* coroner. He would marry a quick tempered couple in the morning, sit on the husband in the afternoon, and try the wife in a preliminary way in the evening for the murder. Sometimes a murderer would escape the grand jury and get lynched. "But he would not escape me. If I could not try him in life's bright summer time, I could sit on him and preside over his inquest after the lynching." Reading a charge of willful murder to one who had committed the crime he asked him to plead, but he said nothing. Then he asked him his reason for killing Smith. He had none. His reason had fled. Of course, during the six years of his judicial life he met with many reverses, especially at the hands of the supreme court, but many more pretentious judges will share his proud boast that during all that trying time he was sustained and soothed by an unfaltering trust in the people, even though the higher courts did not sustain and soothe his decisions. Looking over these years he asks himself the question: "Is there anything in the way of official triumph and official honor in all this that cannot be attained by most any bright young American?" And there is grim humor in his answer. "Certainly not. Patient endeavor, untiring industry and political purity, coupled with a profound intellect and massive thought works, will surely win in the struggle for preferment, and there is no reason why any young man so equipped may not ultimately rise also to a position as justice of the peace."

NOTES OF RECENT DECISIONS.

EXEMPTIONS — GARNISHMENT IN FOREIGN STATE—DAMAGES.—The Appellate Court of Indiana decide, in Kestler v. Kern, 28 N. E. Rep. 726, that a creditor who, by assigning his claim to a resident of another State for the purpose of evading the exemption laws of his State, an act forbidden by Rev. St. Ind. 1881, §§ 2162, 2163, collects his claim against a debtor who resides in the same State with himself from property that would have been exempt had suit been brought in his own State, is liable therefor to his debtor in a civil action for damages. Reinhard, J., dissents from the conclusion of the court. Crumpacker, J., says:

In the case before us the first question to be settled in logical order is, do the facts set out in the complaint constitute a legal injury? Under the common law, if a debtor had two cloaks, one could be seized and sold for his debt, without regard to his necessities, or the necessities of those dependent upon him for support. When this rigid and uncharitable rule began to give way to a nobler sentiment of benevolence, in the form of constitutional and statutory provisions designed to protect the debtor, and those relying upon him for maintenance, from absolute want and destitution, it was regarded as an epoch in our jurisprudence marking the entrance of humanity into a higher civilization; and now every nation on the globe, which lays any claims to a respectable order of civilization, has provisions, more or less adequate, for the relief of the debtor and his family. The right to a reasonable amount of property exempt from seizure or sale for the payment of debt is vouchsafed by the constitution of this State, and the laws which have been enacted to secure this right to the debtor have been and are, it may be said to the credit of our institutions, especially favored in the administration of justice. They have been characterized by the courts as "humane," "beneficent," "benevolent," and "benign," and they have uniformly been interpreted with great liberality in favor of the debtor. Section 703, Rev. St. 1881, provides that an amount of property not exceeding in value $600 shall be exempt from sale upon execution or other final process against a householder, upon a demand growing out of or founded upon contract. While the exemption provided in this section is absolute in terms, it is made by other provisions to depend upon the contingency that the debtor will claim the privilege at the time and in the manner laid down, or he will be deemed to have waived it, and it is regarded as a personal right to be asserted, rather than an absolute right created by force of the provisions of the statute. The law presumes, however, that the debtor will avail himself of the privilege, in the absence of evidence of a contrary intention. State v. Harper, 120 Ind. 23, 22 N. E. Rep. 80. Section 959 provides that the earnings of an employee of any person or corporation shall not be subject to garnishment for his debt, so long as he shall remain in the service of such person or corporation, not exceeding one month's wages. This provision seems to be absolute, and is not dependent upon any act of the debtor; yet, if earnings so made exempt should be attached in the courts in this State, and the beneficiary of the law should fail to assert his right to the exemption, it would amount to a waiver. It is made a crime punishable by fine for any person to send, or cause to be sent, any claim against a citizen of this State into another State, or to assign or transfer such claim, for the purpose of being collected in the courts of another State, with the purpose and intention of depriving such debtor citizen of his rights under the exemption laws of this State, where the parties and subject-matter are within the jurisdiction and could be reached by the process of the courts in this State. Sections 2162, 2163, Rev. St. 1881; State v. Dittmar, 120 Ind. 54, 22 N. E. Rep. 88. In the case under consideration the complaint discloses facts which, if true, would subject the appellee to a criminal liability under the provisions of section 2162, *supra;* and while it is true that statutes of that character are designed primarily to promote the public welfare, and infrac-

tions thereof should ordinarily be redressed by public prosecutions, yet the almost unbroken current of authority sanctions the right in an individual, who has been specially damaged by an act which is in violation of a criminal statute, to maintain an action for his damages, notwithstanding the same act may subject the wrong-doer to a penalty in a public prosecution. In every violation of the penal laws enacted for the protection of society, each member of the body politic suffers an injury, in theory, at least; but such injuries as are common to all the citizens cannot be made the basis of a private suit, but, where one is injured above that inflicted upon him as a member of the commonwealth, the rule is different. Powell v. Bunger, 91 Ind. 64. Such special injury, however, must ordinarily arise from an invasion of some civil right existing independent of the criminal law, or expressly conferred thereby. Judge Cooley, in his work on Torts (page 7), says: "When an act or neglect which constitutes a public wrong is specially and peculiarly injurious to an individual, and obstructs him in the enjoyment of some right which the law has undertaken to assume, the offender may be subject to a double liability; he may be punished by the State, and he may also be compelled to remunerate the individual." See same work (2d Eq.), p. 102; 1 Suth. Dam. pp. 3 6. It was held in Wilson v. Joseph, 107, Ind. 490, 8 N. E. Rep. 616, that where an act is made punishable by statute it is as effectually prohibited as if the act were legislated against in positive and direct prohibitive terms. It was said by the court in New v. Walker, 108 Ind. 365, 9 N. E. Rep. 386: "It is an elementary rule that what the law prohibits under a penalty is illegal, and cannot, therefore, be the foundation on a right between the immediate parties." In the case before us the appellant was a resident householder of the State, and was entitled to the benefit of our laws exempting property from the payment of debt under certain circumstances. By an unlawful act of the appellee, which was done with that end in view, the appellant's right to exemption was defeated, and that which the law declares he should enjoy with impunity was taken from him. His rights were violated, and his loss was special and substantial.

The next question for determination is, has the appellant suffered damages which the law will recognize and remunerate? It is a familiar maxim of the law that for every wrong there is a remedy. In Ashby v. White, 1 Salk. 19, Lord Holt said: "If a statute give a right, the common law will give a remedy to maintain that right." In Cooley on Torts (page 20) it is said: "It is a legal paradox to say that one has a legal right to something, and yet to deprive him of it is not a legal wrong. Where the law thus declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that in respect to the matter involved no claim to legal rights can be advanced." It cannot be said that the unlawful act which deprived appellant of his right to exemption resulted in no damage in contemplation of law, because the funds were applied in payment of his just debt. If this were the law, in every instance where an officer refused to set apart property claimed by a debtor as exempt from sale, the debtor would be remediless, providing the proceeds of the property were applied upon the debt. This interpretation of the law would render practically nugatory every provision intended for the relief of the debtor. But it has been decided and adhered to with marked steadfastness that if an officer refuses to surrender property exempt from sale, but proceeds to dispose of it, the debtor may recover the property in the hands of an innocent purchaser, or he may sue the officer and the judgment plaintiff, or either of them, for trespass, and recover the value of the property, notwithstanding he may have had credit for it upon his debt. Huseman v. Sims, 104 Ind. 317, 4 N. E. Rep. 42; Conwell v. Conwell, 100 Ind. 437; Douch v. Rahner, 61 Ind. 64: Graham v. Crocket, 18 Ind. 119; Haswell v. Parsons, 15 Cal. 266; Below v. Robbins, 76 Wis. 600, 45 N. W. Rep. 416; State v. Harrington, 33 Mo. App. 476; Alsup v. Jordan, 69 Tex. 300, 6 S. W. Rep. 831; Thomp. Homest. & Ex. § 877; Freem. Ex'ns, § 215.

In the State of California the exemption law requires the debtor to prepare and tender a schedule to the officer holding the writ, and designate the property claimed exempt from sale, very similar to the requirement of the law in this State. In the case of Haswell v. Parsons, *supra*, it was held by the court that, where an execution has been issued and property set apart to the debtor upon his application under the exemption laws, and the execution was returned *nulla bona*, and an *alias* execution issued upon the same judgment, which the sheriff levied upon the property before set apart as exempt, and sold it, the defendant being away from home, and unable, on account of sickness, to again apply for exemption, the sheriff was liable to the debtor for the value of the property sold. Under the circumstances, the debtor was held not to have waived his rights to the benefit of the exemption laws. It is now firmly settled in this country that a debtor may enjoin his creditor from sending a claim into another jurisdiction for the purpose of evading the exemption laws of the State where they reside, and of collecting the claim from property exempted by the laws of the home State, whether it is prohibited by the penal laws or not. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269; Wilson v. Joseph, *supra;* Teager v. Landsley, 69 Iowa, 725, 27 N. W. Rep. 739; Mumper v. Wilson, 72 Iowa, 163, 33 N. W. Rep. 449; Keyser v. Rice, 47 Md. 203; Snook v. Snetzer, 25 Ohio St. 516; Engel v. Scheuerman, 40 Ga. 206; Zimmerman v. Franke, 34 Kan. 650, 9 Pac. Rep. 747; Dehon v. Foster, 7 Allen, 57. In Wilson v. Joseph, Elliott, J., speaking for the court, said: "The object of our exemption laws, as this court has many times declared, is to secure to a resident householder the reasonable comforts of life for himself and his family. This is the doctrine asserted by our organic law and by our statutes. It was to give full and just effect to this humane and benign principle of our law that the legislature enacted a statute making it an offense for any person to send a claim against a debtor out of the State for collection in order to evade our exemption laws. Rev. St. 1881, § 2162. The enactment of which we are speaking is prohibitory in its character, for it is one of the rudimentary principles of the law that a statute making an act of criminal offense prohibits its performance as effectually as if the prohibition were expressed in direct terms. There can, therefore, be no doubt that our statutory law prohibits a creditor from evading our exemption laws by sending his claim to a foreign jurisdiction for collection. The attempt to take from a workman the wages earned by him, by sending the claim to a jurisdiction where our exemption laws will not avail him, is one that the courts will not tolerate. They will, on the other hand, lay the 'strong arm of chancery, upon persons within their jurisdiction, and prevent them from taking away the wages which our constitution and our statute wisely secure to him for the support of his family."

It would be a lasting reproach to our jurisprudence,

armed, as it is in its admirable combination, with all the powers and attributes of both law and equity, to hold that while a creditor may be enjoined from sending a claim into another jurisdiction for the purpose of evading our exemption laws, yet, if he should do so successfully without the knowledge of the debtor, or if the debtor on account of his poverty be unable to furnish the necessary undertaking for a restraining order, the law will afford him no redress. In many instances, creditors could assign or transfer claims against our citizens to citizens of other States, for the purpose of facilitating their collection, before a restraining order could be obtained, and no order of injunction, after such assignment or transfer, could interfere with the non-resident assignee, and prevent him from prosecuting proceedings in the tribunals of his own State. The "strong arm of chancery" would afford very inadequate protection under such circumstances. But the extraordinary remedy of injunction never assumes to prevent an act which, if done, would result in no injury in contemplation of the law. It does not undertake to prohibit the commission of an immoral or illegal act, unless it is necessary to protect some recognizable substantial right, either legal or equitable. It is said in High on Injunctions (section 20): "The subject-matter of equity jurisprudence being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts. Equity has no jurisdiction to restrain the commission of crimes or to enforce moral obligations and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal; and, in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts." See, also, 10 Amer. & Eng. Enc. Law, 780. There can be no question, upon principle or authority, that a violation of the statute under consideration is such an unlawful act as will give rise to a right of action in the debtor who has been deprived of his statutory privilege thereby. Such right of action may be in the nature of a suit *ex delicto*, for damages resulting from the unlawful act of another, or it may be *ex contractu*, for money had and received, upon the principle that one who by his unlawful act obtains property which belongs to another will, in law, be deemed to hold it for the use of him to whom it of right belongs. Exemption laws are remedial in their nature, and do not import vested rights or privileges into contracts. Consequently, as a rule, they can have no extra-territorial force. Where the laws of two jurisdictions are substantially the same respecting rights of exemption, however, in a suit between two citizens of one of such States, in the courts of the other, the exemption laws of the State of their residence will be given effect, upon the doctrine of interstate comity. Railroad Co. v. Baker, 122 Ind. 433, 24 N. E. Rep. 83; Drake v. Railway Co., 69 Mich. 168, 37 N. W. Rep. 70; Pierce v. Railway Co., 36 Wis. 288; Railway Co. v. Maltby, 34 Kan. 125, 8 Pac. Rep. 235; Wright v. Railway Co., 19 Neb. 175, 27 N. W. Rep. 90.

While the federal constitution requires that full faith and credit shall be given the judgments and proceedings of courts of other States, this requirement does not prevent a State from preserving the proper legal relations between its own citizens, and compelling one to do to another that which its laws require even if he has acquired an advantage by the sanction of a tribunal in another jurisdiction. In the case of Phillips v. Hunter, 2 H. Bl. 402, this doctrine was announced with much vigor and clearness. In that case the plaintiff was the assignee of one who had been adjudged a bankrupt. The defendants were creditors residing in England, and they sent their claims to this country for collection, and attached debts due the bankrupt in Pennsylvania, and secured the proceeds thereof. The suit was to recover from them the proceeds of such collection, and the court held that, as the parties were all citizens of that county, it had the power to enforce an observance of the laws as between them, and that the defendants should account to the assignee for the proceeds of the foreign collections. Among other things the court said: "In an action for money had and received, the receipt shall be always deemed to inure to the use of him who hath the right, even though it be taken under adverse title." In Keyser v. Rice, *supra*, the court said: "The power of the State to compel its citizens to respect its laws, even beyond its own territorial limits, is supported, we think, by a great preponderance of precedent and authority." The case of Stark v. Bare, 39 Kan. 100, 17 Pac. Rep. 826, is precisely like the case at bar. The parties to the action were both residents of Kansas, and the plaintiff was in the employment of a railroad company, which operated a line of railroad extending from within the State of Kansas to and within the State of Missouri. The laws of Kansas exempted the wages and personal earnings of its citizens, for a period not exceeding 60 days, from attachment or garnishment for the payment of debts. The defendant held a claim against the plaintiff, which he sent into the State of Missouri for collection, for the purpose of evading the exemption laws of Kansas, and collected his claim by attaching the earnings of the plaintiff. The suit was to recover damages, including the amount of wages attached, and the court held the defendant liable, saying: "In the present case both parties are citizens of the State [Kansas] and subject to its laws. According to the allegations of the petition, Stark brought his action in Missouri, at a place far distant from the residence of Bare, for the express purpose of evading the Kansas laws, and wrongfully appropriating the earnings of Bare to which he was not entitled. We think it was a wrong which may not only be restrained by injunction, but that the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained."

In the case of Teager v. Landsley, *supra*, the court held that a creditor who, in violation of an order of court restraining him therefrom, collected his debt by seizure of property exempt from execution in the State of Iowa, by attachment proceedings in another State, was liable to the debtor in damages for the value of the property so appropriated. In Albrecht v. Treitschke, 17 Neb. 205, 22 N. W. Rep. 418, the facts were as follows: Albrecht owed Treitschke upon account, which the latter put in judgment. The former was in the employment of the Omaha Smelting & Refining Company, and wages were due him from such employer, which were exempt from attachment or seizure for the payment of debts. Treitschke, without the knowledge of Albrecht, caused a garnishee process to issue against the smelting company, and by virtue thereof obtained an order against the latter for the payment of the wages due Albrecht upon the judgment against him. Albrecht then sued Treitschke for recovery of the wages obtained by him by the garnishment, and the court held that he was entitled to recover, declaring that "it is well settled that, if exempt property is seided and applied to the payment of a debt, the owner may have his action against the wrong-doer, unless such exemption is waived by some

act or omission of the debtor." In the case of Schaller v. Kurtz, 25 Neb. 655, 41 N. W. Rep. 462, personal earnings had been appropriated by a creditor in payment of his demand, by proceedings in garnishment, in violation of the debtor's rights under the exemption laws, and in the decision of the question the court said: "Where, by garnishee process, a creditor obtained the money of his debtor which was exempt from execution, a cause of action thereby arose in favor of the debtor against the creditor."

From an examination of the questions involved in the case before us, we are firmly convinced that, in harmony with the principles of justice and the greater weight of authority, the appellee was guilty of an actionable wrong in assigning and transferring his claim against the appellant for the purpose of evading the exemption laws of this State, and that substantial legal damages resulted from such wrongful act.

PLEDGE—EXECUTORY CONTRACT—REPLEVIN BY PLEDGEE.—In Huntington v. Sherman, before the Supreme Court of Connecticut, it appeared that defendant agreed that the tools which he had in plaintiff's shop, which he occupied as their tenant, should be turned over to them as security for overdue rent, but there was no agreement of forbearance on plaintiff's part in relation to the debt, nor any change in the conditions in regard to it. The only writing between the parties was a list of the tools made by plaintiffs with the aid of defendant. There was no actual delivery of possession to plaintiffs; defendant, by agreement with them, continuing to use the tools in his trade. It was held that the agreement was not an actual pledge, but an executory pledge contract, and, as there was neither actual nor constructive delivery of the tools, there was no valid consideration for the contract, to entitle plaintiffs to enforce it, and they could not, therefore, maintain replevin for the tools, under Gen. Stat. Conn. § 1323, which provides that the action may be "maintained to recover any goods or chattels in which the plaintiff has a general or special property, with the right to their immediate possession, or which are wrongfully detained from him in any manner." Loomis, J., says:

There is a distinction of controlling importance in this case between an executory pledge contract and an actual pledge. The essentials of the contract are (1) a subject-matter; (2) a debt or engagement; (3) a meeting of the minds of the parties that the subject-matter shall be handed over to secure the payment or fulfillment of the debt or engagement. But to consummate the contract and constitute the pledge there must be delivery. Until this takes place there is no pledge, but only an executory pledge contract. If such contract is supported by sufficient consideration, each party may hold the other bound to perform it. Damages may, of course, be recovered for non-performance, and in some cases, doubtless, equity might decree specific performance. In the case at bar the court expressly finds that "all the implements and chattels mentioned in the plaintiffs' complaint were in the shop, and continued in the possession and daily use of the defendant in his occupation as a tinner, and the same were not out of his possession until they were taken by the plaintiffs by writ of replevin," etc. And again the court in another connection says; "No delivery of the goods was made to or possession obtained by the plaintiffs." This is conclusive that there was no actual delivery. Was there any constructive delivery?

The sole foundation for the latter is the finding that, "several days after the memorandum was made, the defendant agreed with the plaintiff that the articles should remain in the shop until the indebtedness was paid;" but the circumstances ordinarily furnishing a basis for constructive delivery are wholly wanting. The goods were not at sea, nor in a warehouse, nor were they too ponderous to be readily moved, nor were they placed within the power and control of the plaintiffs. It is true the plaintiffs owned the shop where the goods were, but the defendant as lessee held lawful possession, and how long he would or could so hold was uncertain. The pledge agreement contemplated no time for surrendering the possession of the shop to the plaintiffs. There was formerly very little disagreement among the authorities in regard to the proposition that to complete a pledge the pledgee must take possession, and that to preserve the pledge he must retain possession, (unless a redelivery to the pledgeor was made for some temporary purpose). The greater number of authorities still continue to support this doctrine. Beeman v. Lawton, 37 Me. 543; Collins v. Buck, 63 Me. 459; Walcott v. Keith, 22 N. H. 196; Bank v. Nelson, 58 Ga. 391; Nevan v. Roup, 8 Iowa, 207; Ceas v. Bramley, 18 Hun, 187; Propst v. Roseman, 4 Jones (N. C.), 130; Homes v. Crane, 2 Pick. 607; Bonsey v. Amee, 8 Pick. 236; Walker v. Staples, 5 Allen, 34; Kimball v. Hildreth, 8 Allen, 167; Foltier v. Schroder, 19 La. Ann. 17; Story, Bailm. (9th Eq.) § 297; Jones, Pledges, §§ 23, 27; Edw. Bailm. §§ 176, 209, 223. See a review of the cases in a note, to Lucketts v. Townsend, 49 Am. Dec. 730.

We have observed, however, for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary, and that the possession may be regarded constructively where the contract places it. Keiser v. Topping, 72 Ill. 226; Tuttle v. Robinson, 78 Ill. 332; Martin v. Reid, 11 C. B. (N. S.) 736; Easton v. Bank, 127 U. S. 536, 8 Sup. Ct. Rep. 1297; Schouler, Bailm. 182-185. The exigency of the present case does not require us to decide whether the pledgeor himself may not in some cases be the agent of the pledgee to take and keep possession for the latter, or whether there may not be cases where the possession may be considered constructively where the contract places it; for it is manifest that there must be in all cases a valid executory contract to uphold the transaction and secure the thing pledged to the pledgee while there is no actual change of possession. In other words, the executory pledge contract must have force and vitality enough to compel an execution of it, to be good between the parties. In the present case there was, in the absence of actual delivery, no valid consideration. The only consideration was a pre-existing debt, but there was no agree-

ment for forbearance, no change at all in the debt, and no change in the condition of the plaintiffs or defendant. In other words, there was no benefit whatever to the promisor, and no detriment or inconvenience to the promisee.

ABATEMENT—GARNISHMENT — CONFLICT OF LAWS.—In German Bank v. American Fire Ins. Co., the Supreme Court of Iowa hold that in an action in an Iowa court on a policy of insurance issued to an Iowa corporation by a Pennsylvania insurance company, doing business in Iowa and Illinois, an action against the insured in Illinois by other parties residing therein, and the garnishment of its claim against the insurance company, may be pleaded in abatement; because, presuming the laws of Illinois, which were not pleaded, to be the same as those of Iowa, the Illinois court had acquired jurisdiction of the cause of action, since Code Iowa, § 2580, provides that an action aided by attachment may be brought in any county of the State, wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident, and section 1144 requires a foreign insurance company doing business in this State to appoint an agent upon whom process may be served. Robinson, J. says:

The ground of the demurrer is, in substance, that the facts set out in the answer fail to show that the Illinois court has jurisdiction of defendant, or of the subject-matter of this action. The theory upon which the demurrer was sustained appears to be that defendant and the Dubuque Mattress Company were, as to Illinois, foreign corporations; and as defendant is not shown to have had the money in controversy in its possession in that State, and as the transaction out of which the indebtedness arose was not in any way connected with any office or agency of defendant, jurisdiction was not acquired by the proceedings therein had. There are authorities which hold that process of garnishment served upon a non-resident of the State in which the action is pending, who is not temporarily within that State, is not effectual as an attachment; and the reason given for such holding is that property not in the State, in the hands of non-residents, and debts due from them, are not within the jurisdiction of the court, and therefore cannot be acted upon by it. Wright v. Railroad Co. (Neb.), 27 N. W. Rep. 94. "Mere *choses in action* are considered with reference to the trustee process as local, and not as following the person of the trustee wherever he may transiently be found." Sawyer v. Thompson, 24 N. H. 514. In that case it was held that, if all the parties are inhabitants of another State, the garnishee cannot be charged where suit is brought, unless he has goods in his hands belonging to his principal, or has contracted to pay him money or deliver him goods in the State where the action is brought and the process of garnishment is served; and, in the absence of statutory enactment to the contrary, that is, perhaps, the general rule, especially when the defendant is not personally served within the State. Lawrence v. Smith, 45 N. H. 539; Green v. Bank, 25 Conn. 452; Gold v. Railroad Co., 1 Gray, 425; Tingley v. Bateman, 10 Mass. 343.

But we do not think the authorities cited are applicable to this case. The pleadings do not show what the laws of Illinois are, excepting as we have stated, and, in the absence of a showing to the contrary, we must presume that they are the same as the laws of this State. Defendant, when garnished, was doing an insurance business under a license duly issued. In order to transact such business, it was necessary for it to appoint an agent in that State on whom process might be served with the same effect as though it had been served upon the company. Code, § 1144; Insurance Co. v. Rodecker, 47 Iowa, 165.

The fact that it had been licensed, and was doing an insurance business in the State, authorizes the presumption that it had in all respects complied with the requirements of its laws. *Ex parte* Schollenberger, 96 U. S. 369. By so doing, it became subject to those laws, and to treatment in many respects as a domestic corporation, and liable to be sued in all respects as such a corporation would be. McNichol v. Mercantile Rep. Agency, 74 Mo. 472; Railroad Co. v. Harris, 12 Wall. 65. An action aided by attachment may be brought in any county of the State, wherever any part of the property sought to be attached may be found, when the defendant whose property is thus persued is a non-resident of the State. Code, § 2580. The record does not show what agency defendant had in Illinois; but whether it had its principal place of business for the State in Cook county, or whether it was found there in the person of an agent, is immaterial, for the purposes of this case. No question is made as to the agent upon whom service was made, nor as to the county in which the action was brought, and the provisions of law were ample for commencing action against defendant and enforcing its liability in Illinois. Code, §§ 1144, 2584, 2586. Proceedings by garnishment are, in effect, a suit by the defendant in the name of the plaintiff against the garnishee. Drake, Attachm. § 452; Daniels v. Clark, 38 Iowa, 559. Had the mattress company, before assigning its claim, brought suit against defendant in Illinois, it cannot be doubted that it could have recovered, and any creditor of the mattress company could have appropriated the debt by means of an action against that company aided by attachment. Therefore, assuming that defendant owed the mattress company when Glover & Willcombe commenced their action, it was authorized. The case of Mooney v. Railroad Co., 60 Iowa, 347, 14 N. W. Rep. 343, as to the right of garnishment, is much like this in principle, and supports the conclusion we have reached. See, also, Railroad Co. v. Crane, 102 Ill. 249; Morgan v. Neville, 74 Pa. St. 56; Barr v. King, 96 Pa. St. 487; McAllister v. Insurance Co., 28 Mo. 216.

It must be understood that what we have said applies to the attachment by garnishment of debts, and not to other personal property, as merchandise, which has a corporeal existence and an actual location. The rule in regard to such property was considered in Montrose Pickle Co. v. Dodson & Hills Manuf'g Co., 76 Iowa, 172, 40 N. W. Rep. 705. It is our opinion that the pleadings show that the superior court of Cook county acquired jurisdiction of the claim in controversy by its process of garnishment, and the service of notice of the proceedings on the bank, plaintiff in this action.

THE VALIDITY AND EFFECT IN ONE OF THE UNITED STATES OF A DECREE OF DIVORCE BY THE TRIBUNALS OF ANOTHER.

The effect that should be given to a foreign decree of divorce, has been a subject often discussed in the courts of England and Scotland; and no little complication, has been added to the question in the United States, growing out of the relations existing between the several States. The jurists of the Continent hold that a decree of a foreign court, competent according to the laws of its sovereign, declaring the *status* of a person is universally binding;[1] while the early doctrine of the English courts, a result of the doctrine of perpetual allegiance, and the denial of the right of expatriation, was that a marriage celebrated in England could be annulled only according to the English law of divorce,[2] but they have since adopted the view that the law of the place of the parties' domicile governs in questions of divorce, notwithstanding the fact, that the marriage is an English one.[3] The courts of Scotland, going to the other extreme from the early English doctrine, are ready to found their jurisdiction on the presence merely of the complainant in Scottish territory.[4] It seems to be generally admitted by the courts of this country, that the decree of divorce of courts foreign to this country will be held valid here, in case the parties are domiciled within the jurisdiction of the court decreeing and in that case only.[5]

The federal constitution provides, that, "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[6] In pursuance of this clause, congress, after providing for the manner of their proof, has enacted, "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given them, in every court within the United States, as they have, by law or usage, in the courts of the State from which the said records are or shall be taken."[7] Some authorities contend, that the effect of this clause and statute is, to make a decree of divorce obtained in one State, according to the laws thereof, the parties appearing and submitting to the jurisdiction, although neither party be domiciled in the State, valid and of full effect everywhere in the United States, including the State of the parties' actual domicile.[8] It is certainly of great importance to determine, if this be the true rule or not, and if not, what may be formulated as the rule, or what effect is to be given to this clause and statute.[9] As this is a constitutional question, the court of last resort, and consequently, the court of highest authority, no matter in what State, it may be quoted, is the Supreme Court of the United States. Accordingly, we will first consider the interpretation that has been placed upon this clause by that court.

When the clause in question first came up before the supreme court for interpretation, it was construed to give to the judgment of a court of one State the same validity and effect in every other State in the Union, as it had in the State in which it was rendered,[10] but later cases, while they hold, that the effect of this clause is to give the judgments of State courts the same effect in every other State, that they have in the one where rendered,

[1] Vattel's Law of Nat. Book II. § 85; Greenl. Evid. § 544.

[2] Lolly's Case, Russ. & Ry. 237; Tovey v. Lindsay, 1 Dow. 117; Dorsey v. Dorsey, 7 Watts, 349, 350.

[3] Warrender v. Warrender, 2 Shaw & McL, 154, 197, a very elaborate discussion; Briggs v. Briggs, 11 Cent. Law Jour. 46, a case decided in English High Court, Probate and Divorce Division.

[4] Ferguson Mar. and Div. Introd. pp. 18, 19; Dorsey v. Dorsey, *supra*.

[5] DeMill v. DeMill, 120 N. Y. 485, s. c., 24 N. E. Rep. 996.

[6] Const. U. S. Art. IV, § 1.

[7] Act of Cong. May 26, 1790; 1 Stat. at Large, 122.

[8] 1 Minor's Inst. s. p. 280; 2 Kent Com. 108, 109. This author only raises the question, whether that will be the effect. In Visher v. Visher, 12 Barb. 640, the court said, "I am inclined to the opinion that a divorce granted by the courts of one of our sister States, after appearance; or if the parties are domiciled, then after service, there being no fraud or collusion, would be conclusive here. And it may be doubted, in case of appearance and litigation on the merits, whether proof of the domicile of the parties, or the *lex loci contractus*, or the *locus delicti*, would affect the decree." But this was not necessary to the decision of the case, the decree of the Michigan court being held void, because of fraud, and want of appearance by the defendant.

[9] See article on "Foreign Divorces," 28 Cent. Law Jour. 498.

[10] Mills v. Duryee, 7 Cr. 484; Hampton v. McConnel, 3 Wheat. 234; D'Arcy v. Ketchum, 11 How. 175; Maybew v. Fletcher, 6 Wheat. 129.

and that such judgments cannot be impeached in another State for fraud, still hold, that they are open to inquiry, as to the jurisdiction of the court rendering them, and to impeachment on this ground and on no other.[11] It being now well settled that such judgments are liable to impeachment for lack of jurisdiction in the court, the question arises; What is necessary in order to confer jurisdiction in a divorce case? We have been unable to find in the decisions of the supreme court any case that directly decides the question. The case of Cheever v. Wilson[12] is cited, on the one hand, to uphold the doctrine of the authorities quoted above, that a domicile is not necessary to make the judgment valid in all the States, and on the other hand, to show that a domicile on the part of one of the parties is necessary in all cases to confer jurisdiction upon a court to grant a divorce. After a careful consideration of this case, it seems to the writer, that although the case was decided upon another point, it was clearly the opinion of the court, that a domicile by one party was necessary. The latter view, besides being better supported by this case and the decisions of the State courts, is the one most consonant with reason and the principles of justice. Marriage, although it originates in a contract, is a *status* of the person, and it is certainly nothing but reasonable, that each State should have the right, without the interference of the tribunals of other States in a matter in which they have no interest, of determining the *status* of its own citizens, as long as they retain their citizenship.[13] When, however, the husband and wife have their domicile in different States, which we shall see later on, is possible under certain circumstances, this right of each State to decide the *status* of its citizens, must necessarily, from the circumstances of the case, be in a measure curtailed; because, if the State in which either party is domiciled, proceeds to exercise through its courts, this right of determining the *status* of its citizens, and dissolves the marriage relation, it thereby affects the *status* of the other party. But this is not because the State where one is domiciled exercises any jurisdiction over the other party, but the party in the other State ceases to be married, because he or she, as the case may be, ceases to have a husband or a wife. If it were required that both parties be domiciled in a State, in order to give its courts jurisdiction, a husband by deserting his wife in the State where they were both domiciled, whereby, if she continues to reside there, she acquires a separate domicile there, and removing his domicile to another State might preclude his wife from any redress whatever, in any form, for his wrongful act. The injustice of such a rule and the hardship which it would work are so manifest that it has never been held.

It is the settled rule, founded on reason and justice, as we have seen, and directly laid down by the Supreme Court of the United States that proceedings may be instituted where either party is domiciled, the place of the marriage, of the offense, and where the other party is domiciled being of no consequence.[14] By the same court it is decided, that the divorce is valid everywhere, if reasonable notice has been given either by personal service, or by publication in accordance with the laws of the State, even though there has been no appearance by the defendant and she has never resided in the State.[15] From the case of Cheever v. Wilson, above discussed, we draw the conclusion that a decree of divorce is in no case valid, and will in no case be rendered effectual in the courts of another State, by the clause of the constitution, unless one of the parties is

[11] Christmas v. Russell, 5 Wall. 290, 305; Hanley v. Donoghue, 116 U. S. 1, 4; Chicago & Alton Ry. v. Wiggin's Ferry Co., 119 U. S. 615, 622; State of Wis. v. Pelican Ins. Co., 127 U. S. 265, 291, 292.

[12] 9 Wall. 108. In this case the parties were formally domiciled in Washington City. The wife removed to Indiana, and after a residence of a short while, whether a *bona fide* domicile or not, the case does not show, instituted proceedings for divorce. Her husband personally appeared. The following is an extract from the opinion of the court: "The decree was valid and effectual in Indiana. The constitution and laws of the United States give the decree the same effect everywhere else which it had in Indiana. 'If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States.' * * * The only question is the reality of her new residence and change of domicile." The court continues, that the domicile was found in the decree, and then raises the question whether the finding is conclusive or only *prima facie*, and concludes that it is unnecessary to decide this point as there is no rebuttal. It is only *prima facie*. See authorities above, that jurisdiction is impeachable. Also, Lieth v. Lieth, 39 N. H. 20; Hoffman v. Hoffman, 46 N. Y. 30.

[13] Pennoyer v. Neff, 95 U. S. 714, 722.

[14] Cheever v. Wilson, 9 Wall, 108, 124.

[15] Cheely v. Clayton, 110 U. S. 701, 705.

domiciled in the State whose courts have rendered the decree. This rule as well as the one above is confirmed by numerous State authorities which we will mention.

It now becomes us to consider the question of domicile, and when the wife may acquire one separate from that of her husband. A domicile has been defined to be "a fixed residence in a place without any present intention of moving therefrom, and to which, whenever one is absent, he has the intention of returning."[16] The domicile of the husband must in general be regarded as that of the wife,[17] and, if she separate from him without sufficient cause, and he is in a State in which she has never resided, still his domicile is her domicile;[18] but, if the husband deserts her, or acts in a manner inconsistent with the marriage relation, the wife may, through necessity acquire a separate domicile. If a husband be divorced *a mensa et thoro*, and remove to another State, the domicile of the wife does not follow his, but remains the same as it was.[19]

The decisions of the State courts on this subject of divorces in other States have followed almost every imaginable view. These decisions are in many instances directly opposed to each other and cannot be reconciled by any process of reasoning. Yet, it may be regarded as settled by a decided weight of authority, both in numbers and the strength of the opinions: First, that the domicile of either party in a State gives jurisdiction, irrespective of where the cause of action arose, of where the marriage was celebrated and of where the other party is domiciled, and any court of that State authorized by the laws of the State can decree a divorce, which will be valid in every court in the United States;[20] Second, that if neither of the parties is domiciled the courts of the State have no jurisdiction, and the decree will be given no effect in other States under Art. IV. § 1, of the constitution.[21] Some decisions not in conformity with the above propositions will be mentioned in the note.[22]

As regards the domicile of the wife the decisions of the State courts are scarcely more uniform than in regard to the requisites of jurisdiction. They all hold that the domicile of the husband is usually to be regarded that of the wife.[23] Some have held, that the wife gains a new domicile when the husband commits an offense, or is guilty of such a deriliction of duty as entitles her to have the marriage dissolved;[24] some that a change of the husband's does not draw after it the wife's domicile, so as to deprive her of the protection of the law;[25] others that their domiciles are not the same after divorce *a*

[16] Story Confl. L. § 43; Visher v. Visher, 12 Barb. 640.

[17] Cheever v. Wilson, *supra*.

[18] Cheely v. Clayton, *supra*.

[19] Barber v. Barber, 21 How. 582.

[20] Harding v. Alden, 9 Greenl. (Me,) 140; Gould v. Crow, 57 Mo. 204; Ditson v. Ditson, 4 R. I. 87, 93. This is the fullest and most elaborately considered case I have seen on the subject. Harteau v. Harteau, 14 Pick. (Mass.) 181; Barber v. Root, 10 Mass. 265; Cox v. Cox, 19 Ohio St. 502; Lieth v. Lieth, 39 N. H. 20, 40; Hare v. Hare, 10 Tex. 355; Thompson v. State, 28 Ala. 12; Manley v. Manley, 4 Chand. (Wis.) 97; Hubbell v. Hubbell, 3 Wis. 662; Rose v. Rose, 129 Mass. 243, 248.

[21] Ditson v. Ditson, 4 R. I. 87, 93; Sewall v. Sewall, 122 Mass. 157, 164; Van Fossen v. State, 37 Ohio, 317. In this case a decree of a Colorado court, under a statute of that court allowing it, and for a cause arising in that State was held void, because neither party was domiciled, and Van Fossen was convicted of bigamy. Lieth v. Lieth, 39 N. H. 20; People v. Dawell, 25 Mich. 247; Opinion by Cooley, J., is a strong one. Thompson v. State, 28 Ala. 12; Hood v. State, 56 Ind. 263, S. C., 5 Cent. Law Jour. 35, S. C., 26 Am. Rep. 21; Litowich v. Litowich, 19 Kan. 451, 455.

[22] The courts of New York, while they seem to agree that the domicile of one party is necessary to give jurisdiction, hold that a decree rendered on such jurisdiction is not valid unless the defendent appeared or was served with notice; Hill v. Hill, 28 Barb. 23; Visher v. Visher, 12 Barb. 640, 643; McGiffert v. McGiffert, 31 Barb. 69; Kerr v. Kerr, 41 N. Y. 272. The case of People v. Baker, 76 N. Y. 87, S. C., 10 Cent. Law Jour. 171, holds that while such a decree will be valid in regard to the resident of the State of the decreeing court, it will be void and of no effect in regard to the citizen of New York. In other words that one party is divorced and the other not. It has been held that the law of the domicile at the time and place of the injury is the rule for divorce: Dorsey v. Dorsey, 7 Watts (Pa.), 349, 353; that the cause alleged must occur where complainant is domiciled when the libel is filed: Hollister v. Hollister, 6 Pa. St. 449; that the injured party must seek relief in the forum of the defendant, unless the defendant has removed from what was before the common domicile: Colvin v. Reed, 5 P. F. Smith (Pa.), 375; Reel v. Elder, 62 Pa. St. 308; that a Tennessee divorce was null and void because the wife did not appear, nor was served with process, nor was subject to the laws of Tennessee: Irby v. Wilson, 1 Dev. & Bat. Eq. R. (N. C.) 568, 576; that divorce must be according to the *lex loci contractus*, and that a South Carolina marriage cannot be dissolved outside of the State: Hull v. Hull, 2 Strobhart's Eq. (S. C.) 174. See also, Duke v. Fulmer, 5 Rich. Eq. (S. C.) 121.

[23] Ditson v. Ditson, *supra;* Davis v. Davis, 30 Ill. 180; Kashaw v. Kashaw, 3 Cal. 312.

[24] Ditson v. Ditson, *supra*.

[25] Harteau v. Harteau, 14 Pick. 181, 186.

mensa et thoro;[26] still others have gone to the length that the domicile of the wife is not restrained to that of her husband when they have adversary interests in a suit between them.[27] On the other hand, it has been held that the wife cannot change her domicile without the consent of her husband,[28] and again, the wife has been refused a divorce for the husband's wrong, because the husband's domicile and accordingly (the court held) her domicile was in another State.[29]

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[26] Visher v. Visher, 21 Barb. 640, 643.
[27] Irby v. Wilson, 1 Dev. & Bat. Eq. R. (N. C.) 568, 581.
[28] Maguire v. Maguire, 7 Dana, 181.
[29] Dorsey v. Dorsey, 7 Watts. 349, 350.

SALE—WARRANTY—CAVEAT EMPTOR.

COURT V. SNYDER.

Appellate Court of Indiana, October 13, 1891.

Where the answer in an action for the price of a horse alleged that the horse, at the time of the sale, had an internal disease which could not be discovered by the utmost care and diligence, and which caused his death in a few months; that plaintiff knew of the defect and purposely concealed it; that he employed an auctioneer and did not instruct him not to warrant the horse; and that before the sale the auctioneer in response to the defendant's inquiry stated that the horse was sound and free from disease; but there was no allegation that plaintiff was present at the sale or knew of the auctioneer's warranty, a demurrer on the ground that the facts pleaded failed to establish an implied warranty, was held to be properly sustained.

REINHARD, J.: This was an action on a promissory note, brought by the appellee against the appellants. There was an answer in two paragraphs. The court sustained a demurrer to both paragraphs of the answer, and this ruling is assigned as error. The note was given as the purchase price of a mare. The answer attempts to set up what the appellants designate as an implied warranty, though we confess it appears to us more as an effort to plead an express warranty. The averments of the first paragraph of the answer are that the mare for which the note was given, and which constituted the only consideration for such note, was at and before the time of the sale thereof "sick and diseased, and had the seeds of an internal disease or malady, from which she died in about three months after said sale; that said disease or malady with which said mare was affected was latent, affecting her internal organs and functions, and the same was not discoverable by the utmost care and diligence, and these defendants did not know or suspect the existence of the same at the time of said purchase; that said plaintiff knew of the disease or malady with which said mare was affected before said mare was sold to these defendants, and he purposely concealed the existence thereof from these defendants in order to obtain a sound price for said mare; that the more effectually to sell said mare as sound, he procured and employed an auctioneer to sell said mare at public sale; that said auctioneer had full authority to sell said mare, and he was not instructed by said plaintiff not to warrant the soundness of said mare; that at the time said sale was progressing, and before the purchase was made, these defendants inquired of said auctioneer whether said mare was sound and free from disease, and they were informed by said auctioneer and by another employee of said plaintiff that said mare was sound and free from disease, which information they relied upon as true, and on the faith thereof they purchased said mare as sound and free from disease, and for the full value of said mare if she had been sound and free from disease," etc. The second paragraph is in all essentials the same as the first.

Are the facts pleaded sufficient as an answer to the complaint? As a general rule, if there be no express warranty, the law does not imply one. In such cases the rule of *caveat emptor* is usually applied. This, we say, is the general rule, which is not, however, without its exceptions. One of the exceptions is in case of fraud. Says Parsons. "It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. * * * The weight of authority requires that this should be active fraud. The common law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe; but if he be more than silent—if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. * * * The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." 1 Pars. Cont. 578. The rule is that, where the sale is an executed one, the buyer takes the thing sold with all the defects, if there be neither warranty nor fraud; and the decided weight of authority is also to the effect that a sale for a sound price implies no warranty. *Id.* 584, and note *r*. See, also, Postel v. Oard, 1 Ind. App. 252, 27 N. E. Rep. 584; Benj. Sales, § 641 *et seq.*; 10 Amer. & Eng. Enc. Law, 127 *et seq.* Where there is no willful misrepresentation or artful device to disguise the character or conceal the defects of the thing sold, the vendee is bound by the contract, even though the vendor got a decided advantage in the trade, and put off on the vendee a defective article, such as an unsound horse. Beninger v. Corwin, 24 N. J. Law, 257.

See, also, 5 Lawson, Rights, Rem. & Pr. § 2373. The mere fact that the seller is aware of a latent defect in the animal will not amount to fraud if he fail to disclose it, unless he made some statement, or made use of some act or device, calculated to deceive the buyer, or to induce him not to make inquiry. His mere silence is not such an act as will constitute fraud, and certainly no warranty can be implied therefrom. In such cases the buyer can always protect himself by inquiry, and by requiring an express warranty. While this rule may in individual cases result in hardships, and give designing men an apparent advantage over the unwary, its opposite would lead to endless litigation and injustice. 1 Pars. Cont. 577. It was said by Shaw, C. J., in Matthews v. Bliss, 22 Pick. 48: "Each may act upon the knowledge which he has, without communicating it; but *aliud est tacere, aliud celare*. If there be studied efforts to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestions or representation, then the transaction is tainted with turpitude." See, also, Roseman v. Canovan, 43 Cal. 110; Smith v. Countryman, 30 N. Y. 655. There must be a suggestion of falsehood, as well as a suppression of the truth. 10 Amer. & Eng. Enc. Law, 112. We are not unaware that there are cases which hold that even mere silence will sometimes taint a transaction with fraud. There are circumstances, indeed, under which it becomes the seller's duty to disclose a latent defect that is unknown to the buyer, even though he is not asked about it, or has said or done nothing to mislead the buyer. But we do not think the facts averred bring this case within the lines of that class of cases. Just what the circumstances were under which the sale was made, other than that it was at public auction, is not apparent from the answer. It is nowhere averred that the appellee was present at the sale or knew the slightest thing about it, except that he instructed the auctioneer to sell the animal, and did not forbid him to warrant her. If there is any fraud shown it must consist in his failure to go to the auction sale, and there to make it known that the mare was unsound. But this cannot be so. On the contrary, it is well settled, we think, that he cannot even be bound by express warranties made by the auctioneer or other special agent, without he has specifically authorized such warranty. Trading, etc., Co. v. Farquar, 8 Blackf. 89; 1 Wait, Act. & Def. 478; 1 Amer. & Eng. Enc. Law, 981. This being the law, and the appellants being presumed to know the law, we do not see how it was possible for them to be legally defrauded by the acts or statements of the auctioneer or the third party present at the sale; and how the silence of the appellee could have contributed to such result when he is not shown to have been personally present at the sale, or even to have had any communication with appellants upon the subject of the sale, it is not easy to perceive. Implied warranties arise by operation of law from the facts pleaded. It seems very much to us that it was the theory of the pleader here to set up an express warranty by the auctioneer, rather than to establish an implied warranty by the facts pleaded. But, however that may be, we do not think the facts sufficient in either case. We conclude, therefore, that the court committed no error in sustaining the demurrer to the answer. Judgment affirmed.

NOTE.—In the doctrine as to implied warranties in the sale of personal property, a marked distinction is made between warranties of title and warranties of quality; between contracts executory in their nature and contracts of present sale.

Manifestly in an executory agreement the vendor warrants by implication his title to the goods which he promises to sell; he cannot fulfill his contract by transferring, not the *property*, but the *possession* of another man's goods. Benj. Sales, § 948.

And in the case of a contract of sale executed by a present delivery, the seller's possession of the goods has been very generally held to imply a warranty of title. Brown v. Pierce, 97 Mass. 46; Miller v. Van Tassel, 24 Cal. 458; Dryden v. Kellog, 2 Mo. App. 87; Long v. Hickinbottem, 28 Miss. 772; McCoy v. Archer, 3 Barb. 323; Davis v. Smith, 7 Minn. 414; Hunt v. Sackett, 31 Mich. 18; Smith v. Ruggles, 3 N. Y. S. 329; McKnight v. Devlin, 52 N. Y. 399; Paulsen v. Hall, 18 Pac. Rep. 225, 39 Kans. 365; Code Ga. § 651. Possession here must be taken in its broadest sense and as including possession by a bailee of the vendor. Whitney v. Haywood, 6 Cush. 82; Shattuck v. Green, 104 Mass. 42.

As to quality, the general rule is *caveat emptor*, and there is no implied warranty. But the rule rests upon the duty of the buyer, to examine the goods and protect his own interests; where from the circumstances of the case there is no opportunity for examination, of course the rule cannot apply. Dawson v. Chisholm, 1 N. Y. Sup. Rep. 171. Thus there is an implied warranty that when goods of a certain description are ordered, they shall conform, in quality, to the description in the order (2 Kent's Com., 13th ed., 479; Jones v. Just, L. R. 3 Q. B. 197; 9 Best & S. 141; Moody v. Greggson, L. R. 4 Exch. 49; Heyworth v. Hutchinson, L. R. 2 Q. B. 447; Long v. J. K. Armsby Co., 43 Mo. App. 253; William Anson Wood M. & R. Co. v. Thayer, 3 N. Y. S. 465, 50 Hun, 516; Gould v. Stein, 23 N. E. Rep. 47, 149 Mass. 570; Gould v. Brophy, 43 N. W. Rep. 834); that goods which the seller undertakes to supply shall be merchantable (Wilcox v. Hall, 53 Ga. 635; Gammell v. Gunby, 52 Ga. 504; Code Ga. § 2651; Pease v. Sabin, 38 Utah, 432; Ketchum v. Wells, 19 Wis. 25; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Jones v. Just, L. R. 3 Q. B. 197, 9 Best & S. 141; Hood v. Bloch, 11 S. E. Rep. 910, 29 W. Va. 244; Weed v. Dyer, 27 N. W. Rep. 379, 60 Mich. 387; Holloway v. Tacoby, 15 Atl. Rep. 487, 120 Pa. St. 583; but see Englehardt v. Clanton, 3 S. E. Rep. 680, 83 Ala. 336); that goods to be manufactured or furnished for a particular purpose shall answer the purpose in the same manner as other articles of the same class. Jones v. Padgett, 24 Q. B. Div. 650; Shaw v. Smith, 25 Pac. Rep. 886; Murer v. Bliss, 14 Daly, 150; Lee v. Sickles Saddlery Co., 38 Mo. App. 201; Blackmore v. Fairbanks, etc. Co., 44 N. W. Rep. 548; Curtis, etc. Mf'g Co. v. Williams, 3 S. W. Rep. 517, 48 Ark. 325. But see, Ottawa Bottle & F. G. Co. v. Gunther, 31 Fed. Rep. 208. For manifest reasons this rule applies with special force to sales of articles of food. Copas v.

Anglo-Am. P. Co., 41 N. W. Rep. 690; Civil Code Cal. § 1768; Blackwood v. Catting P. Co., 18 Pac. Rep. 248, 76 Cal. 212. But it has been held not to be applicable to one not a common dealer in provisions. Giroux v. Stedman, 14 N. E. Rep. 538, 145 Mass. 439.

On the other hand in an ordinary contract of sale executed by a present delivery of the property, affording opportunity for examination, the rule *caveat emptor* applies, and in the absence of fraud or of an express warranty, the buyer purchases at his own risk. Benj. Sales, § 965; Byrne v. Jansen, 50 Cal. 524; Lord v. Grow, 39 Pa. St. 88; Carson v. Bailie, 19 Pa. St. 375; Barnard v. Kellogg, 10 Wall. 383; Eagan v. Call, 34 Pa. St. 236; Weimer v. Clement, 37 Pa. St. 147; Rice v. Forsyth, 41 Md. 389; Hight v. Bacon, 126 Mass. 10; Moses v. Mead, 1 Denio, 378; Otis v. Cullom, 92 U. S. 447; Meyer v. Richards, 46 Fed. Rep. 727; Tacoma Coal Co. v. Bradley, 27 Pac. Rep. 424; Postel v. Oard, 27 N. E. Rep. 584; Hoffman v. Oates, 77 Ga. 701; Horner v. Parkhurst, 71 Md. 110, 17 Atl. Rep. 1027; Titley v. Enterprise Stone Co., 20 N. E. Rep. 71, 127 Ill. 457; Nester v. Mich. L. & I. Co., 37 N. W. Rep. 278, 69 Mich. 290. The maxim applies notwithstanding there are defects not discoverable by inspection. Bragg v. Morrill, 49 Vt. 45; Bartlett v. Hoppock, 34 N. Y. 118; Deming v. Foster, 42 N. H. 165; White v. Stelloh, 43 N. W. Rep. 99; 74 Wis. 435.

Whether the knowledge by the vendor of such a latent defect will, if undisclosed to the buyer, as in the principal case, amount to fraud, or have the effect to imply a warranty, is a question upon which there is a distinct conflict of authority. Many cases hold the doctrine stated by Prof. Parsons and cited in the principal opinion that "the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." 1 Pars. Cont. 578; Kohl v. Lindley, 39 Ill. 324; Scott v. Rennick, 13 B. Mon. 63; Goldrich v. Ryan, 3 E. D. Am. Rep. 324; Cogel v. Kinselsy, 89 Ill. 598; Beninger v. Corwin, 24 N. J. L. 257; Peoples' Bank v. Bogart, 81 N. Y. 101; Smith v. Hughes, L. R. 6 Q. B. 297.

But the weight of authority and the tendency of the later cases seems to be that where the sale is for the price of a sound article, failure to disclose such a latent defect will amount to fraud. Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Hadley v. Clinton County, 13 Ohio St. 502; Maynard v. Maynard, 49 Vt. 470; Gough v. Dennis, Hill & D. 55; Hanson v. Edgerly, 29 N. H. 343; Carpenter v. Phillips, 2 Houst. 524; Grigsby v. Stapleton, 7 S. W. Rep. 421, 94 Mo. 424. And by Code Ga. § 2651, in every sale there is an implied warranty by the seller that he knows of no latent defects undisclosed. Williams v. Wylly, 45 Ga. 580; Perdue v. Harwell, 4 S. E. Rep. 877, 80 Ga. 150.

WM. L. MURFREE, JR.

JETSAM AND FLOTSAM.

THE STUDY OF LAW.—A writer in THE CENTRAL LAW JOURNAL, in a well written article, discusses the practicability of dividing the doctrines of equity among other branches of law and to cease treating them as independent subjects. Thus the subjects of assignment and estoppel are mentioned as illustrations of equitable doctrines so intermixed with the law itself, as distinguished from equity, that to defer the studies of these doctrines to a later period of the student's education tends to create confusion and uncertainty in his mind when he finds that he has only half learned the subject, and must now piece it out with additional knowledge. Any course of legal education, thinks this writer, should commence by studying a *history* of law. The student should be familiar with the growth of law doctrines, the causes that brought them forth and the times in which they were born. He should also know something of the courts as they existed in early times, and as they gradually developed. "Having laid the foundations for the study of both law and equity by this preliminary historical study, the student will now be prepared to recognize, in the study of any single branch of law, wherein it fails to furnish a complete, adequate remedy. He will naturally turn to equity to see if it supplies the apparent deficiency. And thus, by investigating concurrently the only two sources of authority, he will finish his investigations with a full and complete knowledge." The Harvard method of studying the law by studying leading cases, as introduced and advocated by Professor Langdell, would seem to be an approach to this method, at least so far as it necessitates an examination of the entire field of jurisprudence connected with each case; but it lacks the important feature of a preliminary course in judicial history. We believe that no lawyer who, before he entered upon his legal studies, took up and carefully read and *studied* even so brief a work as Robertson's Introduction to the History of Charles the Fifth will say that the month devoted to that work was not the best spent month of his studentship. Mr. Varnum, the writer of the article alluded to, is only advocating, in this particular, what the best teachers of the law, such as Mr. Hoffman, in his Course of Legal Study, Mr. Bishop, Judge Sharswood and many others have laid down as an essential preliminary to the law student's course.— *Washington Law Reporter.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Claims—Contract for Service.—In a proceeding to establish a claim against an estate for personal services rendered to the decedent, where it appears that the claimant was the decedent's neice, and a member of his family, evidence that she went to live with the decedent on account of his promise to make a will in her favor is admissible in order to rebut the presumption that her services were rendered gratuitously although the promise was not kept, and was void under the statute of frauds.—*Nelson v. Masterson*, Ind., 28 N. E. Rep. 731.

2. ADMINISTRATION—Powers of Executors—Discharge.—The authority of an executor or administrator to represent the estate, unless terminated in one of the modes provided by statute, continues until the estate is fully settled.—*Weyer v. Watt*, Ohio, 28 N. E. Rep. 670.

3. ANTENUPTIAL SETTLEMENT.—A widow of intelligence, mature years, and limited means, being about to marry a man of large fortune, agreed to an antenuptial settlement, fully explained to and thoroughly understood by her, which stipulated that, in consideration of an annuity of $600 to be paid her after her husband's death, she should relinquish all claims against his estate. She was fully informed of the value of her intended husband's fortune, and knew that the reason for making the antenuptial settlement was that his children by a former wife should be protected: *Held*, that the settlement was valid.—*In re Kesler's Estate*, Penn., 22 Atl. Rep. 892.

4. APPEAL—Bill of Exceptions.—Where a bill of exceptions, instead of reciting in full the report of the evidence, merely contains a direction to the clerk to insert in the transcript the reporter's minutes of the evidence, such evidence is not thereby brought into the record, even though the long-hand manuscript of the stenographer's notes was signed by the judge and filed with the transcript.—*Walter v. Uhl*, Ind., 28 N. E. Rep. 733.

5. APPEAL—Order of Judge at Chambers.—Under section 6709 of the Revised Statutes, enacting that a judgment rendered or final order made by the common pleas court may be reversed, vacated, or modified by the circuit court for errors appearing on the record, an order of a judge of the court of common pleas at chambers, overruling a motion to dissolve a temporary injunction, is not reviewable on error by the circuit court.—*Atwood v. Whipple*, Ohio, 28 N. E. Rep. 574.

6. APPEAL FROM JUSTICES—Appearance.—Taking an appeal from a judgment of a justice of the peace, whereby the case becomes triable *de novo* in the circuit court, is equivalent to an appearance, and gives the circuit court jurisdiction over defendant's person, although there has been no sufficient service of process.—*Baltimore & O. R. Co. v. Tess*, Ind., 28 N. E. Rep. 721.

7. ARBITRATION—Unauthorized Submission by Partner.—In an action on an award, it appeared that one partner, without authority of his copartner, signed the submission to arbitration which was not ratified by the non-signing partner prior to the award: *Held*, that the award was void.—*Tillinghast v. Gilmore*, R. I., 22 Atl. Rep. 942.

8. BROKERS — Commission — Admissions. — The fact that a broker asks a third person to go to his principal and urge him to sell to the purchaser found by the broker does not make such person the broker's agent, so as to make his statements as to the relation between the broker and the purchaser competent evidence against the broker.—*Minilla v. Houghton*, Mass., 28 N. E. Rep. 784.

9. CARRIERS—Overcharge for Carrying Freight—Evidence.—On the reasonableness of a charge made by a railroad company for hauling brick, the opinion of a witness who has no knowledge or skill in the adjustment of freight charges is not admissible.—*Little Rock & Ft. S. Ry. Co. v. Bruce*, Ark., 17 S. W. Rep. 363.

10. CARRIERS—Failure to Deliver Goods.—In an action against a carrier for failure to deliver goods committed to him for transportation, evidence as to the plaintiff's purchase of the goods, and his contract with his vendor as to their shipment, is admissible as part of the *res gestæ* to show plaintiff's interest in the goods, to identify them, and to show that he authorized their delivery to the carrier, but not to show that the goods were actually delivered to the carrier.—*New England Manuf'g Co. v. Starin*, Conn., 22 Atl. Rep. 953.

11. COMPROMISE—Right to Rescind.—Where, pending a suit against a railway company for injury to plaintiff's land, plaintiff, by contract under seal, agrees that the land may be valued by two named appraisers, and that on the payment of this valuation by defendant he will convey the land to it, and release all claims for damages, he cannot repudiate his contract, refuse to accept the valuation made by the appraisers and tendered by defendant, and proceed to recover the damages he agreed to release.—*Jones v. Pennsylvania R. Co.*, Penn., 22 Atl. Rep. 883.

12. CONSTITUTIONAL LAW — Police Power—Insurance Rates.—Act Pa. May 7, 1889 (P. L. 116), prohibiting insurance companies from making any discrimination in favor of individuals between rates of insurance of the same class and usual expectations of life, and making the violation thereof a misdemeanor, is not unconstitutional, and is within the police powers of the legislature.—*Commonwealth v. Morningstar*, Penn., 22 Atl. Rep. 867.

13. CONSTITUTIONAL LAW— Title of Act. —Act N. J. March 28, 891, entitled "An act concerning cities of the first class in this State, and constituting municipal boards of street and water commissioners, and defining the powers and duties of such boards, and relating to the municipal affairs and departments of such cities placed under the control and management of such boards, and providing for the maintenance of the same," whose entire object is the constitution of municipal boards of street and water commissioners in cities of the first class, does not violate Const. N. J. art. 4, § 7, subd. 4, providing that "every law shall embrace but one object, and that shall be expressed in the title," the portions of the title as to "defining the powers," etc., being harmless redundancies.—*In re Haynes*, N. J., 22 Atl. Rep. 923.

14. CONTRACT — Breach — Damages. — Defendant, in answer to a letter from plaintiff asking for prices on 12,000 tons of coal, delivered at plaintiff's dock, gave certain figures, and in addition stated that, if plaintiff should require any coal at defendant's dock, it would name him 50 cents per ton in advance of prices given in the answer during the season. Plaintiff accepted the offer: *Held* that, though the clause offering coal at defendant's dock was a mere option, and therefore void, under Rev. St. Ill. ch. 33, § 130, this did not render the contract for the 12,000 tons void, so that defendant could not recover the price thereby fixed for such part of the 12,000 tons as he actually delivered.—*Corcoran v. Lehigh & Franklin Coal Co.*, Ill., 28 N. E. Rep. 759.

15. CORPORATIONS—Withdrawal of Subscriptions.—A subscriber to the stock of a proposed corporation may withdraw his subscription at any time prior to the time at which the company is ready to file its articles of incorporation in the office of the secretary of the commonwealth.—*Auburn Bolt & Nut Works v. Schultz*, Penn., 22 Atl. Rep. 904.

16. COUNTY—Attorney's Fees.—Rev. St. Ind. 1881, § 5096, concerning the proceeding to secure free gravel roads, which provides that "the cost and expense of the preliminary survey, proceedings, and report of said improvement shall be paid out of the county treasury, and be refunded, as well as all other amounts advanced by the county for the preliminary expenses of such improvement," does not empower the county commissioners to order the payment of attorney's fees for services rendered to the petitioners.—*Board of Commissioners of Rush County v. Cole*, Ind., 28 N. E. Rep. 772.

17. CRIMINAL EVIDENCE — Homicide— Threats.—In a trial for murder it is competent to show that on the day of the killing accused was drunk and disorderly, ex-

hibiting a knife, and thrusting a pistol against people, declaring that he would kill some one, not as a part of the *res gestæ*, but as evidence of general malice, a bad character, and a purpose to injure some one.—*Whitaker v. Commonwealth*, Ky., 17 S. W. Rep. 358.

18. CRIMINAL LAW—Arson—Construction of Statute.—Rev. St. Mo. § 3511, declares that the willful setting fire to a dwelling in which there is at the time some person is arson in the first degree. Section 3512 declares that every house where a person lodges shall be deemed a dwelling, but that no barn shall be deemed a dwelling, unless the same be joined to or immediately connected with a dwelling: *Held*, that a barn which is the usual sleeping place of a person is within said sections, and that the setting fire thereto in the night time when he is occupying it is arson in the first degree.—*State v. Jones*, Mo., 17 S. W. Rep. 366.

19. CRIMINAL LAW—Assault with Intent to Kill.—In a trial for assault with intent to kill it was not error to refuse to charge that "a saloon is a public place, in which all persons that so desire may go, and no one has a right to expel another therefrom by force and violence," as the proprietor may lawfully expel one guilty of gross misconduct, and may use such force as is necessary to accomplish such result.—*Burrell v. State*, Ind., 28 N. E. Rep. 699.

20. CRIMINAL LAW—Embezzlement—Surviving Partner.—Under Rev. St. Ind. 1881, §§ 6046-6053, making the duties and liabilities of surviving partners, undertaking to settle the partnership affairs, similar to those of executors and administrators, such a surviving partner is a "person acting in a fiduciary capacity," within the meaning of section 1952.—*State v. Matthews*, Ind., 28 N. E. Rep. 703.

21. CRIMINAL LAW—Gaming—Renting Rooms—Evidence.—Under an indictment charging defendant with renting certain rooms to H and M for card playing, where the proofs showed the rooms were rented to H alone for bedrooms, it was error to refuse to charge that, if "defendant rented the rooms in question to H alone, and not to H and M, as charged in the indictment, you will find defendant not guilty."—*Cronin v. State*, Tex., 17 S. W. Rep. 410.

22. CRIMINAL PRACTICE—Homicide.—An indictment for murder need not allege the killing to have been done "unlawfully," when there is an allegation of "malice aforethought," as this necessarily charges unlawfulness.—*Hunter v. State*, Tex., 17 S. W. Rep. 414.

23. DEATH OF LANDLORD—Estoppel to Deny Executor's Title.—Where tenants, after their landlord's death, attorn to his executor, and pay him rent for a time, it is not necessary for such executor, when suing the tenants for rent, to show that he had under the will any authority to take charge of the real estate, since the tenants are estopped from denying his title.—*Howe v. Gregory*, Ind., 28 N. E. Rep. 776.

24. DEED — Acknowledgment — Clerical Errors.—Though in the certificate of acknowledgment by the grantor of land the word "the" was used where it should appear that "he" executed the same, yet where, from the certificate as a whole, it appears that the officer intended to write "he," and that the omission was a clerical mistake, it is admissible in evidence.—*Durst v. Daugherty*, Tex., 17 S. W. Rep. 388.

25. DEED—Infant—Avoidance by Heirs.—Where a married woman survived her infant child about five months, without disaffirming a conveyance of land made by the infant, her right to avoid it had not been barred by lapse of time, and her heirs could recover her interest in the land.—*Searcy v. Hunter*, Tex., 17 S. W. Rep. 372.

26. DEED OF TRUST—Lien—Mortgage.—A deed of trust designed as security for money advanced, or to be advanced, for the benefit of another, creates a lien on the real property described therein, and is in legal effect a mortgage.—*Thompson v. Marshall*, Oreg., 27 Pac. Rep. 957.

27. DURESS—Threats.—Plaintiff alleged that he executed a note and transferred certain stock to defendant in consideration that defendant would not prosecute plaintiff's son for perjury, and under a threat that otherwise the son would be prosecuted: *Held*, that defendant's threat constituted duress, and that the bill stated equitable grounds for relief.—*Bryant v. Peck & Whipple Co.*, Mass., 28 N. E. Rep. 678.

28. EJECTMENT—Color of Title—Res Judicata.—H conveyed land, and his grantee conveyed to R. After the first conveyance, H made another deed to W. On the latter's death intestate, the guardian of his heirs instituted statutory proceedings to partition the land, whereupon a former wife of W filed a bill to enjoin such proceedings, and in this suit, R, though made a party and personally served with process, failed to appear, and was defaulted. A decree was rendered finding that W's heirs owned the land: *Held*, that R was bound by the decree, even if it was erroneous, and, so long as it was unreversed, neither he, nor any one claiming under him, could set up his title as paramount.—*Sholl v. German Coal Co.*, Ill., 28 N. E. Rep. 748.

29. ELECTIONS AND VOTERS—Qualifications of Voters.—When a person leases a farm, and with the landlord's consent takes possession by moving household furniture upon it, his residence, for the purpose of voting, then begins, though the other members of his family do not at once join him.—*In re Election in Township of Elk*, N. J., 22 Atl. Rep. 926.

30. EVIDENCE—Inscription on Tombstone.—Defendants, for the purpose of discrediting the testimony of a witness that J was the youngest of his father's family, offered in evidence an inscription on a tombstone, showing the date of the birth and death of a person buried thereunder, who defendants alleged was a sister of J, and shown by such inscription to be younger than J: *Held*, for the want of evidence identifying the person buried there as the sister of J, that the inscription was properly rejected.—*Gehr v. Fisher*, Penn., 22 Atl. Rep. 859.

31. EXECUTION—Claim by Third Person.—Under Mansf. Dig. Ark. § 3045, which provides that in a contest as to the ownership of property seized on execution the court shall direct which party shall be considered plaintiff in the issue, where a son claims the ownership of mules given him by his father, and afterwards seized on execution against his father, it was proper for the court to direct that the son on interpleading should assume the burden of proof.—*Norton v. Elk Horn Bank*, Ark., 17 S. W. Rep. 362.

32. EXECUTION — Supplementary Proceedings.—In proceedings supplementary to execution under Rev. St. Ind. 1881, § 822, the fraudulent character of a transfer of property may be inquired into, but plaintiff must disclose in his complaint or affidavit the nature of the claim he seeks to enforce against the third party, and if he relies upon a fraudulent transaction between the judgment debtor and such third person there should be proper averments thereof; and so, if he regards the transaction as amounting to a trust, he should set out the facts constituting the trust.—*Harris v. Howe*, Ind., 28 N. E. Rep. 711.

33. FRAUDULENT CONVEYANCES.—A deed of trust, given to secure creditors of the grantor, who act in good faith, and without notice either to them or the trustee that the goods conveyed by the deed were obtained by the grantor by fraud, will not be set aside at the suit of the creditors from whom the goods were so obtained.—*Oberdorfer v. Meyer*, Va., 13 S. E. Rep. 756.

34. GUARDIAN—Special Findings.—Under Rev. St. Ind. 1881, § 2403, a final report and settlement of a guardian will not be set aside on the ground that the guardian failed to make an inventory of plaintiff's property in proper form, and to file reports at the time they should have been filed, where he honestly discharged his duties, accounted for all money and property in his hands belonging to his ward, and with his final report filed receipts in full signed by the ward after becoming of age.—*La Follette v. Higgins*, Ind., 28 N. E. Rep. 768.

35. HOMESTEAD—Abandonment.—A debtor may claim

a homestead, although temporarily absent therefrom for purposes of trade, if there was no intention to change his residence.—*Robinson v. Swearingin*, Ark., 17 S. W. Rep. 365.

36. HUSBAND AND WIFE — Claim against Husband's Estate.—Where the wife files a claim against her husband's estate, evidenced by his note payable to her with interest from date, she is entitled to receive interest accrued during her husband's life-time as well as after his death.—*In re Reber's Estate*, Penn., 22 Atl. Rep. 880.

37. INJUNCTION—Special Injury—Drains.—The owner of land which has been specially assessed for the construction of a sewer is not entitled to bring suit to enjoin the connection of drains outside the drainage district with such sewer, unless he shows that his property will be specially injured by such connection.—*Springer v. Walters*, Ill., 28 N. E. Rep. 761.

38. INSURANCE—Waiver of Conditions.—Where the adjuster of an insurance company adjusts and compromises a loss, agreeing to pay in a few days the loss as adjusted, the company waives the conditions of the policy, and cannot set up such conditions as a defense to an action by the assured for the sum agreed to be paid by the adjustment.—*Wagner v. Dwelling-House Ins. Co.*, Penn., 22 Atl. Rep. 885.

39. INTOXICATING LIQUORS—Sunday—Evidence.—Evidence that a person walked into the defendant's saloon on Sunday morning, in defendant's sight, went behind the bar, and helped himself to a glass of whisky, is sufficient to justify a conviction for giving away intoxicating liquor on Sunday to be drunk as a beverage.—*Baker v. State*, Ind., 28 N. E. Rep. 735.

40. INTOXICATING LIQUORS — Sunday Sales.—Gen. St. Colo. 1883, subd. 18, § 3312, provides that towns and cities shall have the "exclusive right to license, regulate, or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquors within the limits of the city or town," etc.: *Held*, that where a town takes control of its liquor traffic under this statute, and grants licenses, a licensee cannot be indicted under a general statute of the State prohibiting "keeping open a tippling-house on the Sabbath day."—*Cunningham v. People*, Colo., 27 Pac. Rep. 949.

41. JUDGMENT AGAINST CORPORATION — Answer by Stockholder.—Where a stockholder in a railway company, after the entry of a judgment against the company, but at the same term, is, upon his motion and good cause shown, made a party defendant, with leave to file answer, and thereupon answers to the merits, gives notice of appeal, and perfects his appeal to the circuit court, it is error in the appellate court to strike from the files and suppress such answer because of its having been filed after judgment.—*Henry v. Jeans*, Ohio, 28 N. E. Rep. 672.

42. JUDGMENT BY CONFESSION — Post-dated Note.—Where a note dated April 1, 1888, and payable one year after date, contains a warrant of attorney empowering any attorney of any court of record "to appear for me and confess judgment against me as of any term," for the amount of the note, a judgment entered August 24, 1886, is valid, as the date at the head of the note has nothing to do with the warrant of attorney, which was evidently intended to become operative on delivery of the note.—*Volkenand v. Drum*, Penn., 22 Atl. Rep. 881.

43. LANDLORD AND TENANT—Tenancy from Year to Year.—A tenancy from year to year cannot be created by an occupancy for two years under a verbal agreement to work land on shares for a term of five years.—*Unglish v. Marvin*, N. Y., 28 N. E. Rep. 634.

44. LANDLORD AND TENANT—Use and Occupation.—Defendant moved his barn upon plaintiff's land pending a negotiation for the sale of the barn to the plaintiff. The sale not being made, plaintiff notified defendant to remove the barn: *Held*, that defendant, as plaintiff's tenant at will, was liable for the use and occupation of the land after receiving such notice.—*Michael v. Curtis*, Conn., 22 Atl. Rep. 949.

45. LANDLORD AND TENANT — Wrongful Entry—License.—In an action by the lessee against the lessor for wrongful entry during the term, and injuries resulting from his acts on the leased premises, where the lessor pleads a license to enter and repair the premises, and the reply is a general denial, the only issue is on the giving of the license; and an instruction that plaintiff may recover if the terms of the license were violated after the entry is erroneous, as not being within the issues.—*Spades v. Murray*, Ind., 28 N. E. Rep. 709.

46. LIBEL—Charging One with Being an Anarchist.—It is libelous to falsely publish of a person that he is an "anarchist," since one who advocates anarchy, which as commonly understood is subversive of all government, is liable thereby to be brought into hatred or contempt.—*Cerveny v. Chicago Daily News Co.*, Ill., 28 N. E. Rep. 692.

47. LIBEL — Justification — Mitigation. — Under Civil Code Ky. § 124, which provides that in actions for libel the defendant may show mitigating circumstances to reduce the amount of damages, it was competent to show the existence of a general rumor prior to the publication of the alleged libelous article that plaintiff was guilty of the corrupt conduct charged.—*McIntyre v. Bransford*, Ky., 17 S. W. Rep. 359.

48. LIFE INSURANCE—Insurable Interest of Creditor.—A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount to cover the debt, and the cost of such insurance, together with interest on such amounts during the period of the expectancy of life of the assured according to the Carlisle tables; and the fact that the debtor dies before the expiration of his expectancy will not affect the validity of the policy, or the right to recover the whole amount thereof.—*Ulrich v. Reinoehl*, Penn., 22 Atl. Rep. 862.

49. LIMITATIONS—Acknowledgment of Debt.—A statement by a debtor to his creditor that "he [the debtor] knows that he owes him, and that he will see that he will pay it; that the boys [the debtor's sons] had got the best farms, and they must pay it"—is not such a distinct and unequivocal acknowledgment of the debt as to stop the running of the statute of limitations.—*Keener v. Zartman*, Penn., 22 Atl. Rep. 889.

50. LIMITATIONS OF ACTIONS.—The statute of limitations begins to run against an action to recover money paid for insurance on property in which the assured had no insurable interest, as soon as the fire occurs and the company refuses to pay, even if not when the premiums are paid, though the assured may not have known that he had no insurable interest until a decision of the supreme court, rendered some years afterwards, in an action by him on the policy.—*New Holland Turnpike Road Co v. Farmers' Mut. Ins. Co.*, Penn., 22 Atl. Rep. 923.

51. LIMITATIONS OF ACTIONS—Foreclosure of Mortgage.—As the statute of limitations does not, after the prescribed period, discharge the debt, but simply bars a remedy thereon, a mortgage under seal, which by Code Civil Proc. N. Y. § 381, is not barred within 20 years, may be foreclosed by action within such time, though the note which it was given to secure is barred, and although the mortgage contains no covenant to pay.—*Hulbert v. Clark*, N. Y., 28 N. E. Rep. 638.

52. MALICIOUS PROSECUTION—Pleading.—A complaint for malicious prosecution, which alleges that the action was commenced and the affidavit for *capias* made maliciously and without probable cause, need not also allege that the writ upon which the arrest was made was procured maliciously and without probable cause.—*Swindell v. Houck*, Ind., 28 N. E. Rep. 735.

53. MANDAMUS—Refusal to Administer Oath of Office.—Where the act incorporating a village requires every person elected to office therein to take and file with the village clerk an oath of office, and an ordinance of the village authorizes the clerk to administer such oath, he is bound to do so if applied to for that purpose by a candidate, who is shown to have received a majority of the votes by a paper signed by a majority of the in-

spectors of election, though the clerk himself may be of opinion that the election was not legal, and in such a case *mandamus* will lie to compel him.—*People v. Straight*, N. Y., 28 N. E. Rep. 762.

54. MASTER AND SERVANT—Risks of Employment.—One who accepts employment from a railroad company as a switchman in its yard assumes the risk of injuries resulting to him from a visible defect in the locomotive on which he was to work, consisting of a draw-head so short as to leave too small a space between the locomotive and any car to be coupled to it for the switchman to work in with safety.—*Brooks v. Northern Pac. R. Co.*, U. S. C. C. (Wash.), 47 Fed. Rep. 687.

55. MASTER AND SERVANT—Wages.—Where, in an action for services, the rendering of the services is proved, and the evidence is conflicting as to whether the services were paid for by support and clothing furnished to the plaintiff by the defendant while a member of plaintiff's family, a verdict for the plaintiff will not be disturbed on appeal, as contrary to the evidence.—*Chamness v. Cox*, Ind., 28 N. E. Rep. 777.

56. MEASURE OF DAMAGES — Trespass to Realty.—Where a handsome shade-tree standing in front of a lot temporarily used for mixing tar and gravel, but available and valuable as a site for a high class of residence buildings, is unlawfully, but not maliciously, so cut as to destroy it as an ornamental or shade-tree, but not so as to kill it, or materially injure its value for timber or fire-wood, the measure of damages is the amount which the presence of the tree added to the value of the lot for any purpose in connection with which an ornamental shade-tree is desirable.—*Hoyt v. Southern New England Tel. Co.*, Conn., 22 Atl. Rep. 957.

57. MORTGAGE—Foreclosure.—In a suit to foreclose a mortgage, brought by the assignee thereof, who alleges that the mortgagee executed and recorded a release after the assignment, where defendant asserts title in himself, and prays that it be quieted, the ownership of the land is not in controversy, and hence plaintiff is not entitled to a new trial as of right after a judgment that defendant's title is superior to the lien of the mortgage.—*Rariden v. Rariden*, Ind., 28 N. E. Rep. 701.

58. MORTGAGE—Payment to Co executor.—A mortgagee died, and his administrator transferred the mortgage to certain executors, who purchased the same as an investment under the will of their testator. The mortgagor paid the mortgage in full to one of the executors, who executed a release of the mortgage, and entered satisfaction on the record: *Held*, that such payment to one instead of all the executors was sufficient.—*Fesmyer v. Shannon*, Penn., 22 Atl. Rep. 898.

59. MUNICIPAL CORPORATIONS—Assessment of Property.—Under Rev. St. Ill. 1874, ch. 24, § 139, a city, in making assessments for house drains and water service pipes, has no authority to subdivide into lots property that has never been subdivided by the owners, and to assess each lot for a certain sum, but only to proceed against the property according to the description by which it is legally known and designated.—*Cram v. City of Chicago*, Ill., 28 N. E. Rep. 758.

60. MUNICIPAL CORPORATIONS—Charitable Bequests.—A city, in the absence of some law imposing upon it the duty of accepting, can refuse a trust, and cannot be enjoined from refusing to accept the bequest of a fund to be administered by it for the benefit of the poor.—*Dailey v. City of New Haven*, Conn., 22 Atl. Rep. 945.

61. MUNICIPAL CORPORATIONS—Defective Highways.—In an action against a town for injuries caused by a defective highway, it is proper to admit evidence as to the population of the town, the length of its highways, the amount of money raised by the town for the repair of highways during the year of the accident, and the amount actually expended for that object, for the purpose of showing whether the town did what was reasonable towards repairing the highway in question.—*Sanders v. Town of Palmer*, Mass., 28 N. E. Rep. 778.

62. MUNICIPAL CORPORATIONS—Public Improvements.—Under Rev. St. Ill. 1874, ch. 24, § 134, providing that when a city shall direct a local improvement to be made by special assessment the council shall pass an ordinance to that effect, specifying the nature, character, locality, and description of the improvement, the council alone is clothed with power to determine what the improvement shall be; and a property owner cannot object to the confirmation of an assessment for street paving on the ground that a cheaper paving would have answered as well.—*Cram v. City of Chicago*, Ill., 28 N. E. Rep. 757.

63. NATIONAL BANKS—Insolvency.—A national bank pledged negotiable notes to another bank to secure a loan, and then, a small balance remaining unpaid, became insolvent. Certain of its creditors, before the appointment of a receiver, obtained judgments in the State court, issued executions thereon, and attempted to secure liens on the pledged notes by garnishing the pledgee, but the officer failed to obtain possession of the notes, or to collect the money due thereon. The pledgee refused to surrender the notes to the receiver, and endeavored to collect them, whereupon the receiver sued to recover them: *Held*, that his suit was properly brought in equity, as the claims affecting the subject-matter and the questions to be determined thereon are numerous and complicated, and would otherwise give rise to a multiplicity of suits.—*Chase v. Cannon*, U. S. C. C. (Wash.), 47 Fed. Rep. 674.

64. NEGLIGENCE.—An allegation which directly imputes negligence and carelessness to the defendant in causing a locomotive to run against a car upon which the plaintiff was at work causing it to move, and himself to be thrown down, whereby he was injured, is a charge of negligence made directly upon the defendant itself, and not merely upon its servants. The negligence of a co servant with the plaintiff, engaged in a common service, cannot be said to be the negligence of the defendant.—*Wild v. Oregon Short Line, & U. N. Ry. Co.*, Oreg., 27 Pac. Rep. 954.

65. NEGLIGENCE — Dangerous Premises—Patent Defects.—Where the only means of access to or egress from an hotel are flights of stairs leading to a platform above the ground, neither of which has any railing, the defect in their construction being a patent one, a person who becomes a guest of the hotel assumes the risks incident to that mode of construction, and cannot recover for injuries, received in a fall which was due solely to the want of a railing.—*Ten Broek v. Wells, Fargo & Co.*, U. S. C. C. (Cal.), 47 Fed. Rep. 690.

66. NEGLIGENCE—Pleading.—A complaint in an action for the loss of services of plaintiff's minor son, whose death was caused, while in defendant's employ, by the alleged negligence of defendant in keeping a defective boiler, is not insufficient, after verdict, for failure to allege that deceased had no opportunity of informing himself of the dangerous condition of the boiler, where it avers his youth, inexperience, and ignorance, and the fact that the injury occurred without his fault, and that he had no knowledge of the dangerous condition of the work he was asked to do.—*Louisville, etc. R. Co. v. Berry*, Ind., 28 N. E. Rep. 714.

67. NEGOTIABLE INSTRUMENTS — Interpretation. — Where a note is made payable when a certain mortgage is satisfied of record, and in a subsequent suit the mortgage is declared void upon condition of the payment of $40 into court within 30 days, and such sum is paid, though not till after 30 days, and thereupon the mortgage is satisfied of record by the clerk, the note falls due at the time of the payment of the $40.—*Coulter v. Clark*, Ind., 28 N. E. Rep. 723.

68. NEW TRIAL—Newly-discovered Evidence.—The alleged newly-discovered evidence, which was made the basis of an application for a new trial by defendant, consisted of declarations made by plaintiff 16 years before the action was tried. Defendant made no effort before the trial to discover this evidence, and urged, as an excuse for his failure to do so, that he did not know and had no reason to believe that such evidence existed

Plaintiff had been examined as a witness at the trial of the cause: *Held*, that it was not error to refuse the application.—*Morrison v. Carey*, Ind., 28 N. E. Rep. 697.

69. NUISANCE—Retaining Wall.—Where a city builds a wall several feet high along one side of a school-yard, and fills the yard to a level therewith, its former level being the same as that of adjacent premises, and the wall in course of time becomes pressed out by the weight of filling so as to overhang the said premises a foot or so, it must be deemed an actionable nuisance; and the fact that it was built for the public use and general benefit is no justification.—*Miles v. City of Worcester*, Mass., 28 N. E. Rep. 676.

70. PARTITION — Non-resident Defendants. — In an action under article 977, Hart. Dig. Tex., providing for actions for partition against unknown defendants, service by publication, and appearance of defendants by attorneys appointed by the court, is sufficient to confer jurisdiction of the subject-matter in the court.—*Foote v. Sewall*, Tex., 17 S. W. Rep. 373.

71. PARTNERSHIP.—A contract for the sale of goods, which provides that the goods shall be charged for at reasonable prices, and the buyers to have a credit of one-half the profits, does not establish a partnership between the sellers and purchasers.—*Teller v. Hartman*, Colo., 27 Pac. Rep. 947.

72. PARTNERSHIP—Sale of Interest by Partner.—One partner may, upon a voluntary dissolution of a firm, sell to his copartner all his interest in the partnership concern, and if he do so *bona fide*, before any lien has been acquired thereon by partnership creditors through an execution, an attachment, or otherwise, the transfer will, if such be the intention of the partners, vest in the purchasing partner, divested of the equity of the selling partner to have the partnership assets applied to partnership debts.— *Schleicher v. Walker*, Fla., 10 South. Rep. 33.

73. PARTY-WALLS—Agreement to Pay for Use.—Plaintiff entered into a parol contract with the defendant, whereby it was agreed that he should build a division wall partly upon the land of each of them, and that, when the defendant should use it, he would pay a proportionate share of the cost. Afterwards defendant sold to one who knew that the wall was partly over upon his lot. Plaintiff notified the vendee of his claim under the contract, but the latter refused to recognize it. The vendee then built in connection with the wall: *Held*, that inasmuch as the defendant had rendered impossible the performance of the contract on his part to the detriment of the plaintiff, he was liable.—*Nalle v. Paggi*, Tex., 17 S. W. Rep. 370.

74. PRESUMPTIONS OF DEATH.—Where a mother and her daughter died in the same year, and there is no evidence of the precise date of the death of the mother, an assumption that she died before the daughter is not warranted.—*Cooke v. Caswell*, Tex., 17 S. W. Rep. 385.

75. PRINCIPAL AND AGENT—Custom as Evidence.—The power to bind the principal of a traveling agent selling goods by sample being special, one buying his trunks of samples is bound to know that such sale is within the agent's authority.—*Savage v. Pelton*, Colo., 27 Pac. Rep. 948.

76. PRINCIPAL AND SURETY— Cashier's Bond—Condition.—A cashier's bond was conditioned for the faithful discharge of his duties "for and during the time of his employment by said bank, whether under his present election, or under any subsequent election to the said position, or whether under its present organization or charter, or under any renewals or extensions thereof." There was no formal re-election of the cashier each year after his election: *Held*, that the want of such annual re-election did not relieve a surety from his liability on the official bond of the cashier.—*Shackamaxon Bank v. Yard*, Penn., 22 Atl. Rep. 908.

77. PRIVILEGED COMMUNICATIONS.—The rule making privileged communications between attorney and client does not apply in a controversy between the representatives of two persons, who together consulted an attorney, as to admissions made during such consultation.—*Hurlburt v. Hurlburt*, N. Y., 28 N. E. Rep. 651.

78. RAILROAD COMPANIES—Fires.—The mere fact that property is fired by sparks thrown from the stack of a locomotive engine is not in itself evidence of negligence, unless it appears that the spark arrester was defective, or that the company had not adopted the most approved pattern.—*Henderson, Hull & Co. v. Philadelphia & R. R. Co.*, Penn., 22 Atl. Rep. 851.

79. RAILROAD COMPANIES—Injury at Railroad Crossing.—It is negligence *per se* for a railroad company, in violation of a valid municipal ordinance, to obstruct with standing cars or locomotives a public street or space in actual daily use by the public; and that the municipality may have acquiesced passively in violations of the ordinance will not excuse such negligence. —*Cent. R. R. & Banking Co. v. Curtis*, Ga., 13 S. E. Rep. 757.

80. RAILROAD MORTGAGE — Foreclosure.—The holder of any one of a series of bonds secured by a mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage, for default in the payment of interest.—*McFadden v. May's Landing, etc. R. Co.*, N. J., 22 Atl. Rep. 932.

81. REPLEVIN—Property in Hands of Receiver.—Though property is wrongfully in possession of a corporation, it cannot be replevied, without leave of court, after it comes into the possession of the receiver appointed in voluntary proceedings to dissolve the corporation.—*In re Christian Jensen Co.*, N. Y., 28 N. E. Rep. 665.

82. RES ADJUDICATA.—A decree dismissing a bill solely for want of jurisdiction is not a bar to another bill in the same court for the same cause of action, after a decision of the supreme court, on appeal in an action brought in a different court, that the former court had jurisdiction.—*Weigley v. Coffman*, Penn., 22 Atl. Rep. 919.

83. SALE — Bona Fide Purchaser. — Replevin was brought by the vendors of goods, who elected to avoid the sale made by them, alleging that the vendee procured the goods through false representations, and the sheriff seized the goods in the hands of a person who claimed to have purchased them from the vendee before the issuing of the writ of replevin, and without notice of the vendee's fraud: *Held*, in an action of trespass by the purchaser against the sheriff, that the court erred in rejecting defendant's offer to show that the vendee's title to the goods at the time of plaintiff's purchase from him was voidable, which, if allowed, would have cast on plaintiff the burden of showing himself a *bona fide* purchaser.—*Levy v. Cooke*, Penn., 22 Atl. Rep. 857.

84. SALE—Warrant.—A firm wrote to their agent, with regard to the condition of a lot of hams shipped to the agent, that "there is an occasional ham sour in the marrow," but that the hams as a body were not sour, which letter the agent showed to a proposed buyer of the hams: *Held*, in an action by the buyer to recover on a breach of warranty, that the statement contained in the letter was too indefinite to constitute a warranty that less than a third of the hams were sour in the marrow.—*Wiggin v. Butcher*, Mass., 28 N. E. Rep. 677.

85. SEDUCTION—Pleading.—Where a complaint charges the defendant with abducting and seducing the plaintiff's daughter, it is immaterial for the purposes of demurrer whether the *gravamen* of the action is the alleged abduction or seduction, when the complaint states a good cause of action upon either theory.—*Kreag v. Authes*, Ind., 28 N. E. Rep. 773.

86. SPECIFIC PERFORMANCE — Contract. — Defendant contracted to convey his land, and to keep the buildings thereon insured for the benefit of the purchaser, "as his interest may appear." It was understood between them at the time the contract was made that insurance which defendant had procured in his own name sufficiently fulfilled his agreement to insure. Subsequently the buildings were destroyed by fire, and the purchaser assigned his right under the contract to plaintiff: *Held* that the destruction of such buildings did not excuse

defendant from the performance of his contract to convey.—*Allyn v. Allyn*, Mass., 28 N. E. Rep. 779.

87. STATE LEGISLATURES — Malicious Arrest.—Under Const. Tex. art. 3, § 15, members of the house of representatives, who by their votes have directed a person not a member to be imprisoned for obstructing the proceedings of the house, cannot be made to respond in damages by a suit for unlawful and malicious arrest and imprisonment.—*Canfield v. Gresham*, Tex., 17 S. W. Rep. 300.

88. TAX-TITLES — Defective Notice of Sale.— Under Rev. St. Ill. ch. 120, § 216, providing that no purchaser of lands at a sale for taxes or special assessments shall be entitled to deeds until he has served the owner, occupant, and persons interested with a notice showing, among other things, for what year the lands were "taxed or specially assessed," a notice stating that the sale was for taxes "and" special assessments for a given year is defective, because it does not show for which the sale was made.—*Gage v. Bani*, U. S. S. C., 12 S. C. Rep. 22.

89. TOWNSHIP — Highway Ditch.—A township is not liable for damages caused to property owners by the negligent manner in which a ditch along a highway is constructed by the road supervisor of the road-district, since the supervisor, in constructing a road in his district, is not the agent or servant of the township — *Union Civil Tp. v. Berryman*, Ind., 28 N. E. Rep. 774.

90. TRADE-MARK—Infringement—Cigar Makers' Union. —The subordinate lodges of a trades union association which has a common label for the use of all its members cannot maintain a bill to restrain the unauthorized use of such label; the right of action, if any, is in the parent association.—*McVey v. Brendel*, Pa., 22 Atl. Rep. 912.

91. TRIAL—Direction of Verdict.—Where the evidence tends to support the issues raised by defendant's answer, it is an abuse of discretion to direct a verdict for the plaintiff.—*Fitzgerald v. Hart*, Tex., 17 S. W. Rep. 389.

92. TRUST—Declaration—Evidence.—On the death of one S certain bonds were found in his box in a trust company's vaults, contained in an envelope, indorsed, "Held, for K," and signed with deceased's initials, K being a nephew, who had lived with and been raised by deceased. An entry in the private account book of deceased, in his own handwriting recited: "$13,000 of these bonds I bought for and are the property of my nephew and godson K, and belong to him." On another page interest on the bonds was credited to K: *Held*, that there was sufficient to create a trust in favor of K, and is immaterial whether or not deceased in his life-time actually declared to another his intention to create the trust, or showed the entries in his book.—*In re Smith's Estate*, Penn., 22 Atl, Rep. 916.

93. TRUSTS—Evidence.—In a suit to declare a trust in plaintiff's favor in land conveyed to her father, since deceased, it was shown that her father acted as her agent in managing her money; that shortly before he bought the land he called in several of her loans, stating that he desired to invest the money in land for her; and that at the time he bought it he said to several persons that it was bought for her, and with her money: *Held*, that this was sufficient to warrant finding an agreement to hold the land in trust for plaintiff, and rendering judgment quieting her title thereto.—*Mull v. Bowles*, Ind., 28 N. E. Rep. 771.

94. ULTRA VIRES.—Where a judgment had been obtained against a fire district for injuries resulting from the conducting of electricity into a house by means of one of the wires in the district's electric fire-alarm system, it cannot be said that the district was so clearly exempt from liability for negligence of that sort that a settlement of the claim by compromise was *ultra vires*, or without consideration.—*Prout v. Inhabitants*, Mass., 28 N. E. Rep. 679.

95. VENDOR AND VENDEE—Bona Fide Purchaser.—Defendant purchased certain land as a mill-site, paid for the same, took possession thereof, and proceeded to erect a mill thereon at the expense of several thousand dollars, before receiving a conveyance of the premises, which, when received, by mistake failed to include the mill-site. Plaintiff afterwards purchased the same land from defendant's vendor, with full notice of defendant's purchase and improvements under claim of ownership: *Held*, that plaintiff was not a *bona fide* purchaser of the land, and could not maintain an action to enjoin defendant against building a mill-dam on the omitted part of the premises.—*Smith v. Schweigerer*, Ind., 28 N. E. Rep. 696.

96. VENDOR'S LIEN — Waiver. — Plaintiff conveyed premises to defendant G for $1,800, receiving from G a mortgage for $800, and from defendant B $1,000 in cash, G executing to B a mortgage on the premises to secure such payment. By agreement between the three, the deed and both mortgages were executed, delivered, and recorded at the same time: *Held*, in foreclosure, that by such agreement plaintiff did not necessarily waive his prior equitable lien for the purchase money, and that such lien drew with it the lien of his mortgage, and gave it preference to B's mortgage.—*Boies v. Benham*, N. Y., 28 N. E. Rep. 657.

97. WILLS—Action By Executor.—After distribution has been made of all of a testator's property, and the estate has been fully and finally settled, the executor cannot bring suit for a construction of the will in order to ascertain the estate which passed to one of the devisees, since after such settlement he ceases to be executor.—*Miles v. Strong*, Conn., 22 Atl. Rep. 659.

98. WILLS—Construction.—Testator gave and devised all his estate, real and personal, to his wife during her life, "to be applied to her own proper use, and for the maintenance and education of the minor children;" and he provided that so much of his estate as might remain after the death of the wife, who was appointed executrix, should be sold by the surviving executor and the proceeds divided among testator's children: *Held*, that the widow took the personalty absolutely as legatee, and not as executrix.—*Appeal of Hippenstall*, Pa., 22 Atl. Rep. 860.

99. WILLS—Construction.—Testator gave his wife all his property, both real and personal, "until" their youngest child should reach the age of 17 years, his wife to board, clothe, and educate all the children until that time; and further provided that "when the younger child becomes 17 years of age, I will and bequeath to my wife the one third of my estate, both real and personal; the remainder to my children equally:" *Held*, that each child took a vested interest, which, on his death before the youngest child reached the age of 17, passed to his personal representatives.—*Seller's Ex'r v. Reed*, Va., 13 S. E. Rep. 754.

100. WILLS—Construction.—Testator, who died leaving a widow and a son and daughter, after providing for the two former, gave to his daughter a life-interest in a share of his estate, consisting of both real and personal property, and provided, "after her death, it shall descend and go in reversion to her child or children should she have any; but, in case she died having no issue, in such case to go to and descend in reversion to my heirs at law:" *Held*, that the reversionary interest vested in testator's son and daughter, who were his heirs at law at the time of his death and on the daughter's death, without issue, after the death of the son, leaving their mother surviving, the estate went to the mother as their heir, and not to testator's heirs at law at the time of the daughter's death.—*Kellett v. Shepard*, Ill., 28 N. E. Rep. 751.

101. WILLS—Vesting of Legacies.—Testator authorized his executors to sell his real estate, and directed that the proceeds of that and of his personal estate, after the payment of specified legacies, should be equally divided between his three grand children, in case of the death of any one of whom before payment of his share it was to be divided between the survivors. Testator owed no debts, and sale and distribution of his property might have been made almost immediately after his death: *Held*, that the legacies vested in the grandchildren at testator's death.—*In re Wengerd's Estate*, Penn., 22 Atl. Rep. 870.

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SUBJECT-INDEX

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